No. 86-1632

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

MANFRED R. WETZEL,

Petitioner,

v.

ARIZONA STATE REAL ESTATE DEPARTMENT,

Respondent.

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF ARIZONA

PETITIONER'S REPLY BRIEF

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In Propria Persona

QUESTIONS PRESENTED FOR REVIEW

A. DOES THE FACT-INTENSIVE NATURE OF THE DISPUTE BETWEEN THE PETITIONER AND THE STATE OF ARIZONA DEPRIVE THIS COURT OF CERTIORARI JURISDICTION TO REVIEW THE STATE'S APPLICATION OF THE DOCTRINE OF OFFESIVE COLLATERIAL ESTOPPEL?

B. DOES THE APPROVAL BY THIS COURT OF THE ADOPTION OF THE DOCTRINE OF THE OFFENSIVE USE OF COLLATERAL ESTOPPEL RELIEVE THE STATE OF ARIZONA FROM THE CONSTITUTIONAL REQUISITES OF DUE PROCESS IN APPLYING THAT DOCTRINE?

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Other Authorities:

Rule 17, Supreme Court Rules, Title 28 U.S.C. 4,6

IV.

INTRODUCTION

Following his disbarment by the Supreme Court of the State of Arizona, Petitioner, Manfred R. Wetzel, received a notice of the summary suspension of his real estate broker's license. The grounds cited in the formal complaint for permanent revocation included only the Arizona Supreme Court's opinion in the disbarment matter. At no time was the Petitioner accused of any misconduct in his real estate dealings. Nevertheless, the Arizona State Real Estate Department, Respondent herein, alleged that Petitioner's disbarment conclusively proved that Petitioner lacked a good reputation for honesty in the community, and, therefore, that Petitioner's broker's license should be permanently revoked.

At the hearing on the revocation matter, held on November 15, 16 and 26,

1984, Petitioner was denied the opportunity to attack the findings of the Arizona Supreme Court, despite his offer of proof of previously unavailable evidence that a witness at the disbarment hearing had lied. Furthermore, Petitioner was denied subpoenae for witnesses he wished to call on his own behalf on the issue of his reputation for honesty in the community. The basis for the denial was solely that these witnesses had testified during the disbarment hearing, although none of the witnesses had testified on the issue of Petitioner's reputation. Since that issue was the sole ground for revocation of Petitioner's broker's license, the denial of those subpoenae was an abuse of the doctrine of offensive collateral estoppel and a denial of his right of due process. It is on these grounds that Petitioner seeks a writ of certiorari from this Court.

V.

ARGUMENT

Respondent requests a denial of the writ on two grounds: (1) that the Arizona Court of Appeals' approval of the offensive use of collateral estoppel is not inconsistent with the precedents of this Court; and (2) that the fact-intensive nature of the dispute between the parties makes this case unsuitable for review under the Court's certiorari jurisdiction. Both of these grounds are completely unresponsive to the issues, and both are without merit. Logic dictates that these arguments be addressed in the reverse order.

A. THE FACT-INTENSIVE NATURE OF THE DISPUTE BETWEEN THE PETITIONER AND THE STATE OF ARIZONA DOES NOT DEPRIVE THIS COURT OF CERTIORARI JURISDICTION TO REVIEW THE STATE'S APPLICATION OF THAT DOCTRINE.

Respondent would have this Court deny certiorari because of what it terms

"the fact-intensive nature of the dispute" between the parties. However, nothing in this Court's power of certiorari jurisdiction over state court decisions limits that jurisdiction to only "fact-simple" cases. Rule 17, Supreme Court Rules, Title 28, U.S.C.

In any event, Petitioner has at no time sought to have this Court review the facts of this case, and he does not seek to do so here. In fact, the recitation of facts in Petitioner's opening brief is extremely simplified in light of the voluminous record in this case, which spans nearly 10 years.

The real issue on appeal is whether the offensive use of collateral estoppel: (1) may deprive a party of the right to present evidence during a second action which was not available to him during the first and which may have resulted in a different outcome in the first action had

it been available; and (2) may deprive a party of the right to subpoena witnesses on his behalf in a second action solely because they testified in the first action, irrespective of the fact that they were not called upon to testify on identical issues. As described more fully in Petitioner's Statement of the Case in the Petition for Writ of Certiorari, page 2, these are the very abuses of the doctrine which led to the revocation of Petitioner's real estate broker's license without the fundamental right of due process.

Rather than depriving this Court of certiorari jurisdiction, Respondent's concession of the fact-intensive nature of the matter points out one reason for the need for this Court to clarify its guidelines for the constitutional bounds of the use of the equitable doctrine of offensive collateral estoppel. Particularly where

there are so many facts for consideration, due process demands that an individual's right to a full and fair hearing not be unjustly abridged by the state.

Rule 17(1)(c), Supreme Court Rules, addresses the appropriateness of this Court's review "{w}hen a state court . . . has decided a federal question in a way in conflict with applicable decisions of this Court." As discussed more fully in part B of this argument, some guidelines have been set forth in this Court's earlier decision of Parklane Hosiery Corporation, Inc. v. Shore, 439 U.S. 322, 99 S.CT. 645, 58 L.Ed.2d 552 (1979) on the appropriate use of offensive collateral estoppel. Those guidelines adopt a fairness concept ignored by Respondent during the Petitioner's revocation hearing.

At stake here was the source of Petitioner's livelihood and that of his

family. More important, however, is the potential for further abuses against future litigants.

By way of example as to intensity a few of the facts involved are:

1. Mr. Hart, the chairman of the Bar Committee is a partner of Mr. Kepner. They run an insurance defense firm handling many workmen's compensation cases. On a case called Goins, the trial of which started late because the hearing officer was eating breakfast with Mr. Kepner, the hearing officer as a first matter of business took Petitioner, Wetzel, into a separate courtroom with no one present but the hearing officer and Mr. Kepner. Mr. Kepner began to berate Petitioner by calling him a crook, etc. The hearing officer then took his turn berating Petitioner, the Court of Appeals, and the Arizona Supreme Court. These men work together to cheat innocent people out

of their benefits and appear to have the system rigged. Petitioner was caught off guard by this conduct. The trial then commenced in the regular courtroom and a record was made by Petitioner. Half-way through the trial, Petitioner made a motion for a mistrial based on the court's conduct--the motion was miraculously granted. If this Court read that record, you would be appalled at what went on in the name of Justice. Petitioner's conduct in that matter is above reproach.

Just prior to the retrial some time later, Petitioner received a call from another partner of Mr. Kepner, a Mr. Cunningham, claiming that Goins had threatened to murder Mr. Kepner and Mr. Cunningham who would try the case. Petitioner received a call from the presiding judge of the Maricopa County Superior Court who had also received such calls as had the State Governor's Office.

Mr. Goins had had his face crushed in and his eyes could not focus. He needed extensive surgery. There was no doubt the case was compensable. He knew the trial by Kepner had been crooked. After the retrial, Mr. Cunningham told Petitioner the case should never have been tried because it was obviously compensable on its face. A few days following the trial, Kepner filed another denial of claim. This meant that Goins would have to have another trial, even though he had not yet had the surgery. The hearing officer then put his foot down--right on Kepner's conduct. This accounts in part for the hatred of Mr. Hart and explains why his partners had, prior to the Bar hearing involving Petitioner, made defamatory statements about Petitioner, on and off the record.

Further regarding Mr. Hart, Petitioner had requested that a self-appointed

political and professional "enemy" not sit on the Bar Committee as chairman since he and his firm had been making derogatory statements about Petitioner's ethics and honesty after Petitioner had exposed the firm for its corrupt practices before the Industrial Commission of Arizona. Mr. Hart should not have been on the Bar Committee that heard Petitioner's case. Less biased lawyers would have given Petitioner's attorney time to prepare. Even the Bar summons to Petitioner said he should "respond" in 30 days, and gave no indication that there would be a trial before or at the time the answer was due. Petitioner's attorney called a few days before the 30-day period to answer expired and asked for a few more days to respond (file his written answer), and was told that the 30 days was not for a written answer, but that the trial would begin

then. Looking at that portion of the record, one cannot see any trace of what we, as Americans, traditionally consider to be fair or just.

2. In the 1978 suspension, the word from the Bar Committee was first that Petitioner would receive a censure. Then a month or two later, it was changed to a reprimand. The chairman of that committee wanted to withdraw because he had a conflict. Without advising Petitioner, who had protested to the chairman, Petitioner's attorney told the chairman to stay on since he and the chairman were close friends. Later the reprimand was changed to a 30-day suspension, and so on. Finally, after a year or so of this sort of playing around, Petitioner was suspended indefinitely and was told that it wasn't because he had done anything wrong, but the defense firms just wanted him to play the game and settle cases.

The jist was, why should Petitioner try cases when he could agree to settle and make a fast buck without working so hard? Anyone who knows Petitoner would know that this would increase his unyielding resolve to fight for justice for the little guy. When talking to the Bar prosecutor at a restaurant a few months after the suspension, Petitioner was advised by the prosecutor that the Bar matter was "a dirty deal" and "a rotten mess" and he (the prosecutor) was ashamed of it.

When Petitioner was re-admitted, you would have thought he was a long, lost relative of those who had suspended him. Petitioner can still feel some of the back-slapping. It was like saying, "Okay, you've got the message; now let's settle cases fast and forget about the duty to do your best for your client." What the Bar did in that case was to refer to 50 or so collection and assorted cases filed by

Petitioner on behalf of himself and clients. The Bar considered only 4 or 5 of those cases. They involved allegations of fraud and prayers for exemplary damages. Petitioner's conduct in the other 45 cases was not questioned. Petitioner believed and his attorney advised him that his conduct was proper in all matters involved.

3. In the 1984 disbarment, the Bar prosecutor is the brother of the head of a firm that represented Petitioner in a case prior to the disbarment which has been referred to in the Bar opinion. In that case, the firm lost transcripts of depositions. The transcripts proved beyond any doubt that Petitioner's opponents in the case were lying. However, the attorney for Petitioner spent a total of 15 minutes getting ready for trial and did not discover that he had lost the transcripts until after the trial started.

Before the trial, he indicated that all the preparation he needed was to read the interrogatories submitted to the other side. He thought the trial was going to be continued. Being unprepared, he lost the case and Petitioner was held chargeable for a money judgment. Now, with this type of negligence over its head, the firm made a few feeble threats to sue Petitioner for a portion of the fees it had billed Petitioner. Petitioner was in a dilemna--either pay the judgment and forget the matter or request that the firm handle the appeal, and if the appeal was lost the firm could pay for it's negligence. The firm decided to appeal claiming a 95% chance of winning on appeal. The appeal was lost. The matter was resolved by Petitioner by paying a $70,000 judgment and paying the law firm nothing. Later the brother of the firm's senior partner prosecuted the disbarment

action against Petitioner. Further, the prosecutor's father was a witness against Petitioner.

4. With reference to the two blank tapes, eleven tapes existed. Impeachment tapes were not discoverable. Two blank tapes and some written items were placed in an impeachment envelope and filed with the court prior to trial. On discovery the court felt that the defendants should be able to hear the tapes. Petitioner advised the court in camera that the envelope contained two blank tapes that would be substituted for live tapes later. On a motion for sanctions, the lawyers for the defendants lied to the court and told him all the tapes were blank when in fact they had spent an afternoon recording the eleven. Based on their lies, the judge exploded. Petitioner's case was dismissed and Petitioner's lawyer thought that was the end of the matter and it wasn't worth pursuing further.

4. At the real estate hearing before the Respondent herein, Petitioner presented two judges, two lawyers, community business leaders, a minister, a chaplain and other people to attest to his honesty and that he had a good reputation in the community. The Respondent put in no testimony to controvert these live witnesses or their testimony other than the written disbarment opinions of the Arizona Supreme Court. When the case advanced to the point where Petitioner would call witnesses or to present documentary evidence to prove he was innocent of the findings of the Bar Committee, he was not allowed to call those witnesses. He was deprived of the right to prove his innocence. The offer of proof he made at the time is a stark testimonial against this unfair denial of due process. Punctuating the injustice is the hearing officer's finding which says,

". . . there is no evidence he has engaged in improper conduct with respect to his activities as a licensed real state broker."

The substance of some of the only live evidence of Petitioner's reputation is set forth by the same hearing officer as follows:

"Mr. Wetzel has been a real estate licensee for almost 28 years, and no real estate client has ever filed a complaint against him, nor has he ever been sued as the result of his role as a real estate licensee."

". . . he is a knowledgeable, experienced and competent real state broker, and that the practice of real estate is his principal source of income. He has never been complained against by any real estate client, and states he will continue to honestly and competently represent clients, should he be allowed to

continue the practice of real estate. He submits that, although the allegations made by the Supreme Court are serious, none of his legal clients lost money in any of these cases, and he never cheated anyone."

These are but a few of the facts from a situation that upon looking at the entire record in both cases (the disbarment and the real estate matter) is definitely fact-intensive. Therefore, the facts cited here are sketchy. A full review of both cases would show a more thorough and accurate account of the wrongs done to Petitioner.

It seems Petitioner is denied the right to prove his innocence. A basic duty of a judge or court is to correct a wrong when it comes to its attention. Would this Court please consider reviewing the record in this matter and the prior disbarment and grant the relief requested

in both cases? It is this very fact-intensive nature that screams out for review by this Court in certiorari.

B. THE APPROVAL BY THIS COURT OF THE ADOPTION OF THE DOCTRINE OF THE OFFENSIVE USE OF COLLATERAL ESTOPPEL DOES NOT RELIEVE THE STATE OF ARIZONA FROM THE CONSTITUTIONAL REQUISITES OF DUE PROCESS IN APPLYING THAT DOCTRINE.

Respondent would have this Court deny the writ because the State's adoption of the offensive use of collateral estoppel is not inconsistent with the precedents of this Court. This position fails to address the true issue presented to this Court for review, namely whether the State provided Petitioner the fundamental constitutional requirement of due process by the manner in which the doctrine was applied in this case.

1. RESPONDENT HAS FAILED TO CITE EVEN A SINGLE CASE IN SUPPORT OF THE DENIAL OF PETITIONER'S RIGHT TO PRESENT CERTAIN WITNESSES AND EVIDENCE ON HIS OWN BEHALF DURING THE REVOCATION HEARING BEFORE THE REAL ESTATE COMMISSIONER.

Respondent's brief is strikingly devoid of even a single citation in support of Respondent's use of offensive collateral estoppel to: (1) deprive Petitioner of the use of evidence at the revocation hearing that was unavailable to him during the disbarment hearing and which testimony might have led to a different result had it been available; or (2) to deny him the grant of subpoenae for witnesses he sought to call at the revocation hearing on the issue of his reputation for honesty, solely on the ground that those witnesses testified at the disbarment hearing, even though the substance of the testimony was not necessarily identical. Petitioner respectfully suggests that no case law exists which approves such abuses of the offensive use of collateral estoppel, and that these abuses amounted to a denial of

Petitioner's right to due process during the revocation hearing.

Furthermore, Respondent has failed to distinguish even one of the cases cited by Petitioner in his opening brief. Petitioner respectfully submits that no such distinction can be made.

2. RESPONDENT HAS MISSTATED THE ISSUE BEFORE THIS COURT IN AN ATTEMPT TO DIVERT THE COURT'S ATTENTION FROM THE RESPONDENT'S UNJUST ABUSES OF THE DOCTRINE OF OFFENSIVE COLLATERAL ESTOPPEL.

Respondent has cited on its behalf Parklane Hosiery Corporation, Inc. v. Shore, 439 U.S. 322, 99 S.CT. 645, 58 L.Ed.2d 552 (1979) and Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 92 S.CT. 1434, 28 L.Ed.2d 788 (1971). Those cases approve the offensive and defensive use, respectively, of collateral estoppel by non-parties to the first action. Those doctrines are not in question here.

Respondent further cites the very Arizona opinions Petitioner seeks to have this Court review.

None of this, however, addresses the issues presented to this Court by the Petitioner, namely, that the manner of Respondent's use of the doctrine deprived Petitioner of his fundamental right of due process during the revocation hearing.

This Court has previously addressed the appropriate use of the doctrine of offensive collateral estoppel which incorporates the concept of fairness to the party against whom it is asserted. Parklane Hosiery Corporation, Inc. v. Shore, 439 U.S. 322, 331, 99 S.Ct. 645, 651, 58 L.Ed.2d 552 (1979) outlines a number of considerations this Court deems relevant to the use of the doctrine. In footnote 15, for example, the Court stated:

> "If, for example, the defendant in the first action was forced to defend

> in an inconvenient forum and therefore was unable to engage in full scale discovery or call witnesses, application of offensive collateral estoppel may be unwarranted. Indeed, differences in available procedures may sometimes justify not allowing a prior judgment to have estoppel effect in a subsequent action even between the same parties . . . The problem of unfairness is particularly acute in cases of offensive estoppel, however, because the defendant against whom estoppel is asserted typically will not have chosen the forum in the first action." (Emphasis added, citations omitted.)

To reiterate from Petitioner's opening brief, Petitioner sought a continuance of the disbarment hearing because, despite diligent attempts to retain counsel to represent him, he was unable to do so until just six days before the hearing. The continuance was denied, however, and the hearing proceeded despite Petitioner's inability to adequately prepare. Furthermore, evidence of perjured testimony during the disbarment hearing did not become available to Petitioner until after the disbarment was ordered by the Arizona

Supreme Court. In light of these difficulties, the use of collateral estoppel against Petitioner denied him his fundamental right to due process. The approval of the application of collateral estoppel in this case by the Arizona Court of Appeals, therefore, conflicts with the prior decisions of this Court concerning the appropriateness of such use. Parklane Hosiery Corporation, Inc. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979).

VI.

CONCLUSION

The cursory and unresponsive manner in which Respondent answered Petitioner's opening brief is indicative of the overall callousness and injustice with which Respondent has seen fit to deprive Petitioner and his family of the source of their livelihood.

Used correctly, the doctrine of collateral estoppel is an important and appropriate tool to protect parties from the burden of re-litigating previously resolved issues and to prevent the waste of resources, all to the detriment of the parties involved, other litigants and taxpayers. As important as these considerations are, however, they cannot surmount an individual's right to due process. The doctrine cannot be interpreted so as to allow a state agency to deprive a party of his livelihood without due process of law.

Petitioner respectfully renews his request that this Court grant a writ of certiorari because of the far-reaching implications of this matter. By preventing further abuses of the doctrine, this Court will protect future litigants and their families from the same unjust deprivation of the source of their

livelihood as that faced by the Petitioner and his family.

Petitioner, therefore, respectfully requests the grant of a writ of certiorari to the Court of Appeals of the State of Arizona and the Arizona Supreme Court lifting the order affirming the revocation of Petitioner's real estate broker's license pending proper proceedings before the Arizona State Real Estate Department.

RESPECTFULLY SUBMITTED this 27th day of May, 1987.

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